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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER, Plaintiff, v. NATIONWIDE RECOVERY SYSTEMS, LTD., Defendants.	CASE NO. 07-CV-2132-DMS (AJB) Judge: Hon. Dana M. Sabraw Mag. Judge: Hon. Anthony J. Battaglia **OPPOSITION OF *SPECIALLY APPEARING* DEFENDANT HARRAH'S ENTERTAINMENT, INC. TO NATIONWIDE RECOVERY SYSTEMS, LTD.'S MOTION FOR CONSOLIDATION OF ACTIONS** ACCOMPANYING PLEADINGS: NOTICE; DECLARATION OF RONALD R. GIUSSO Date: February 8, 2008 Time: 1:30 p.m. Courtroom: 10

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I.

INTRODUCTION

Plaintiff, James M. Kinder ("KINDER") has made a business out of exploiting his (619) 999-9999 pager number to litigate under the Telephone Consumer Protection Act of 1991 ("TCPA"). KINDER has filed no less than 360 lawsuits in the past 7 years, many of which helped to create his own virtual cottage industry out of the 999-9999 lawsuits. (Giusso Decl., ¶6.) In 2003, KINDER was deemed by the San Diego County Superior Court to be a vexatious litigant. (*Id.* at ¶5.) Indeed, within a period of just seven months, KINDER filed nine lawsuits in San Diego alone which are the subject of this motion to consolidate.[1] Despite the geographic proximity of these nine cases, they are not identical and do not all require consolidation. Specifically, in the other cases, KINDER alleges only one cause of action for violation of the TCPA. However, in the *James M. Kinder v. Harrah's Entertainment, Inc.* case, KINDER alleges TCPA violations but also alleges three additional causes of action including trespass to chattel and violations of California Civil Code § 1770 and Business and Professions Code § 17200. (Exh. A.) The facts, arguments, and defenses which will be addressed by *Specially Appearing* Defendant Harrah's Entertainment, Inc. are sufficiently dissimilar to other eight cases to warrant denial of NATIONWIDE's motion to consolidate as to *Specially Appearing* Defendants Harrah's Entertainment, Inc., Harrah's Operating Company, Inc., Harrah's Marketing Services Corporation, Harrah's License Company, LLC, Harrah's Laughlin, Inc., and HBR Realty Company, Inc.[2] (collectively "*Specially Appearing* Defendants").

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[1] *James M. Kinder v. Bankfirst,* Case No. 07cv877 DMS (POR) filed 5/15/2007; *James M. Kinder v. Sprint PCS Assets LLC*, Case No. 07cv2049 WQH (JMA) filed 10/26/2007; *James M. Kinder v. Asset Acceptance, LLC*, Case No. 07cv2084 DMS (AJB) filed 10/30/2007; *James M. Kinder v. Astra Business Services, Inc.*, Case No. 07cv2091 H(JMA) filed 10/31/2007; *James M. Kinder v. Nationwide Recovery Systems, LTD*, Case No. 07cv2132 DMS (AJB) filed 11/70/2007; *James M. Kinder v. Discover Card Services, Inc.*, Case No. 07cv2138 WQH(BLM) filed 11/7/2007; *James M. Kinder v. Enhanced Recovery Corporation*, Case No. 07cv2152 DMS (AJB) filed 11/8/2007; *James M. Kinder v. Harrah's Entertainment, Inc.*, Case No. 07cv2226 H (RBB) filed 11/21/07; *James M. Kinder v. Cavalry Investments*, LLC, Case No. 07cv02274 IEG (WMC) filed 12/4/2007.

[2] This court granted KINDER's Motion to Amend his Complaint to add five additional defendants, however, KINDER has not yet filed his First Amended Complaint naming these entities. *Specially Appearing* Defendant Harrah's Entertainment, Inc. assumes the First Amended Complaint will be filed.

II.

PERTINENT FACTS

KINDER filed his complaint against *Specially Appearing* Defendant Harrah's Entertainment, Inc. on October 2, 2007. (Exh. A.) In his complaint, KINDER alleges violations of the Telephone Consumer Protection Act (Exh. A, at ¶¶ 5-9), California Civil Code § 1770 (Exh. A, at ¶¶ 10-15), Unfair Business Practices Act (Exh. A, at ¶¶ 21-23), and an alleged trespass to chattel (Exh. A, at ¶¶ 16-20.) On November 21, 2007, *Specially Appearing* Defendant Harrah's Entertainment, Inc., removed this matter to the United States District Court pursuant to 28 United States Code §§1332 and 1441 (b).

On December 26, 2007, NATIONWIDE filed the instant motion in Case No. 07-CV-2132-DMS (AJB) to consolidate nine of KINDER's cases set within the Southern District of California. On December 28, 2007, KINDER filed a motion for leave to amend his complaint in Case No. 07 CV 2226 DMS (POR) to add Harrah's Operating Company, Inc., Harrah's Marketing Services Corporation, Harrah's License Company, LLC, Harrah's Laughlin, Inc., and HBR Realty Company, Inc. as defendants. *Specially Appearing* Defendant Harrah's Entertainment, Inc. opposed this motion as none of the entities are subject to personal jurisdiction in California. However, KINDER's motion for leave to file a First Amended Complaint was granted on January 22, 2008.

As is more fully set forth below, KINDER's complaint against Harrah's Entertainment, Inc., Harrah's Operating Company, Inc., Harrah's Marketing Services Corporation, Harrah's License Company, LLC, Harrah's Laughlin, Inc., and HBR Realty Company, Inc. will require litigation with very specific motions, arguments, and distinct discovery which none of the eight other defendants will be subject to. Because each of the *Specially Appearing* Defendants are foreign entities, operate out of different locations and are structured differently, personal jurisdiction will be challenged as to each one of the individual entities, requiring separate Rule 12 motions. Additionally, *Specially Appearing* Defendants will move to have KINDER deemed a vexatious litigant in District Court. (Giusso Decl., ¶ 5.) Extreme prejudice and confusion can only result from consolidating *James M. Kinder v. Harrah's Entertainment, Inc., et al.*, with the eight other KINDER TCPA cases. Therefore, the goals of simplification and convenience would not be accomplished by consolidating *Specially Appearing* Defendants' case with the other KINDER cases. *Specially Appearing* Defendants respectfully request that *James M. Kinder v. Harrah's Entertainment, Inc.* not be consolidated pursuant to NATIONWIDE's motion.

III.

AUTHORITY ON CONSOLIDATION

Motions for consolidation are governed by Federal Rule of Civil Procedure § 42 (a) which provides:

> When actions involving a **common question of law** or **fact** are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The burden is on the moving party to persuade the Court to grant its motion to consolidate. (*MacAlister v. Guterma*, 263 F.2d 65, 70 (2d Cir. 1958); *see also Schact v. Javits*, 53 F.R.D. 321, 325 (S.D. NY 1971).) Amongst the factors the Court should consider in determining whether to consolidate are the: (a) **identity of the parties**; (b) the **existence of common questions of law and fact**; and (c) the **potential of creating confusion** by combining multiple claims. In its analysis, the Court must evaluate the special underlying facts with close detail before ordering a consolidation. (*Solvent Chemical Company, ICC Industries, Inc. v. E.I. Dupont De Nemours & Co.*, 242 F. Supp. 2d 196, 220 (W.D. NY 2002); *citing*, *Hooker Chemicals & Plastics Corp v. Diamond Shamrock Corp.*, 96 F.R.D. 46, 48-49 (W.D. NY 1982); *In re Repetitive Stress Injury Litigation*, 11 F.3d 368, 373 (2d Cir. 1993).)

When determining whether to grant consolidation, the trial court "has broad discretion to determine whether consolidation is appropriate." (*Solvent Chemical Company, ICC Industries, Inc. v. E.I. Dupont De Nemours & Co.*, 242 F. Supp. 2d 196, 220 (W.D. NY 2002); *citing*, *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-1285 (2d Cir. 1993).) The Court "must balance the efficiency concerns against the potential for confusion or prejudice which may result from this move." (*Kelly v. Kelly*, 911 F. Supp. 66, 69 (N.D. NY 1996).) "While considerations of judicial economy favor consolidation, those considerations must yield to a paramount concern for a fair and impartial trial." (*Solvent Chemical Company, ICC Industries, Inc.*, 242 F. Supp. 2d at 220.) (internal quotations and citation omitted).)

IV.

SPECIALLY APPEARING **DEFENDANTS' CASE SHOULD NOT BE INCLUDED IN THE CONSOLIDATION REQUESTED AS IT IS DISSIMILAR TO THE OTHER KINDER CASES**

Where one case (amongst several) contains questions of law that are not in common with the other cases sought to be consolidated, the Court may choose not to consolidate the disparate case. (*Clark v. Elgin*, 25 F.R.D. 248, 249 (N.D. OH 1960).) KINDER's complaint (against Harrah's Entertainment Inc., and the to-be-filed First Amended Complaint) is markedly different from the eight other proposed cases that NATIONWIDE has moved to consolidate.

Not only does *Specially Appearing* Defendants' case differ in terms of parties, but the complaint also alleges different causes of action, naturally requiring different proof. Although NATIONWIDE seeks to consolidate the nine cases filed by KINDER in 2007, NATIONWIDE admits KINDER's case against *Specially Appearing* Defendants, is different from KINDER's other cases as it alleges additional causes of action. (NATIONWIDE's Points and Authorities at 3:11-16.) Unlike KINDER's cases against defendants *Bankfirst; Sprint PCS Assets LLC; Asset Acceptance, LLC; Astra Business Services, Inc.; Nationwide Recovery Systems, LTD; Discover Card Services; Enhanced Recovery Corporation; and Cavalry Investments,* KINDER's case against *Specially Appearing* Defendant Harrah's Entertainment Company alleges more than just simple violations of the Telephone Consumer Protection Act. (Exh. A.) Specifically, *James M. Kinder v. Harrah's Entertainment, Inc.* alleges additional causes of action including violations of

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California Code § 1770(a)(22)(A); trespass to chattel; and violation of Business and Professions Code section § 17200. (*Id.*)

Because KINDER alleges three additional causes of action against *Specially Appearing* Defendants, the litigation and trial of these claims would necessarily entail production of distinct facts, added defenses and arguments beyond that required of a solitary TCPA violation. With all these differences, the goal of "judicial economy" through consolidation would not be achieved and the jury would likely be confused. Therefore, NATIONWIDE's motion to consolidate should be denied as to the case of *James M. Kinder v. Harrah's Entertainment, Inc.*

A. Different Parties.

Without question, there is no identity of parties as between *Specially Appearing* Defendant Harrah's Entertainment, Inc.[3] and any of the other defendants in the cases sought to be consolidated by NATIONWIDE.

B. Different Causes of Action and Different Facts.

Factual dissimilarities render consolidation impractical. (*Fleishman v. Prudential-Bache Securities, Inc.*, 103 F.R.D. 623 (E.D. Wis. 1984).) The essential facts giving rise to each and every case that is the subject of this motion to consolidate are necessarily different from one another. For instance, KINDER alleges he received calls from the eight other Defendants. These calls are obviously not the same as the calls he claims he received from *Specially Appearing* Defendants. The alleged phone calls will differ as to: (a) when the alleged calls were made; (b) the information conveyed in the call; (c) whether a recorded message was played; (d) how many calls were allegedly received; (e) the reason for the call; (f) whether the call was made by a live person; (g) whether a dialing system was used and, (h) the method by which each call was made. All of these facts would differ from defendant to defendant.

[3] And, for that matter, there is no identity of parties between any of the other *Specially Appearing* Defendants (Harrah's Operating Company, Inc., Harrah's Marketing Services Corporation, Harrah's License Company, LLC, Harrah's Laughlin, Inc., and HBR Realty Company, Inc.) to be named in KINDER's First Amended Complaint.

Moreover, each of the *Specially Appearing* Defendants in *James M. Kinder v. Harrah's Entertainment, Inc.* will dispute each and every issue raised above. For each additional allegation, *Specially Appearing* Defendants will be compelled to proffer a separate defense which would be inapplicable to the eight other defendants in the proposed consolidation. The goal of streamlining litigation will also not be met by consolidating *Specially Appearing* Defendants' case as discovery and depositions will inevitably vary from one defendant to another. Since the beginning of this litigation, *Specially Appearing* Defendant Harrah's Entertainment, Inc. has argued vigorously that this court does not have personal jurisdiction over it. In the case of *James M. Kinder v. Harrah's Entertainment, Inc.*, the defendants do not conduct business in California, have offices in California, have employees in California, or avail themselves to the benefits of doing business in California, nor do they make automated telemarketing calls to California. (*See*, Exh. B, ¶¶2-3.)

Accordingly, commonality of facts between the eight other cases and the *Specially Appearing* Defendants' case are not present, rendering consolidation unnecessary. Also, although no discovery in this matter has been conducted, the fact that KINDER alleges three additional causes of action on top of his "normal" TCPA allegation, supports that the facts in *Specially Appearing* Defendant's case are substantially different than the other cases giving rise to different causes of action.

For example, KINDER alleges trespass to chattel. Under California law trespass to chattel "lies where an intentional interference with the possession of personal property has proximately cause injury." (*Thrifty-Tel, Inc. v. Bezenek*, 46 Cal. App 1559 (1996).) The Restatement (Second) of Torts section 218 states a person is liable for trespass to chattel of another if the "(a) chattel is impaired as to its condition, quality or value; or (b) the possessor is deprived of the use of the chattel for a substantial time…" Here, *Specially Appearing* Defendants each will present facts in its defense proving that none of the alleged phone calls deprived KINDER of the use of his phone number or pager, and therefore, such calls cannot amount to trespass to chattel under California case law.

KINDER also alleges violations of California Civil Code § 1770(a)(22)(A) which governs telephone communications. Section 1770 (a)(22)(A) states that it is unlawful for a person to disseminate "an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller, and without obtaining the consent of that person to listen to the prerecorded message." Thus, KINDER will be required to show that: (a) the prerecorded message was unsolicited; (b) a natural and unrecorded voice did not inform KINDER a prerecorded message would follow; and (c) KINDER did not consent to listening to the prerecorded message. (Civil Code § 1770.)

None of the other cases that NATIONWIDE seeks to consolidate have a Business & Professions Code §17200 claim. Accordingly, it is only *Specially Appearing* Defendant Harrah's Entertainment, Inc. that will have to present evidence that it did not engage in unfair business practices, and will also have to dis-prove to the trier of facts each and every element required under this cause of action.

The disparity between the *Specially Appearing* Defendants' case and the other proposed cases to be consolidated is resounding. Asking *Specially Appearing* Defendants to participate in a joint litigation where so many of the facts and issues differ amongst defendants would result in added delay, inconvenience and expense in the way of attorney's fees and costs. Consolidation would require each defendant to attend motion hearings and trial on issues which are not shared by all. (*Vaccaro v. Moore-McCormack Lines, Inc.*, 64 F.R.D. 395 (S.D. NY 1974).) It is inequitable, inefficient and burdensome for *Specially Appearing* Defendant Harrah's Entertainment, Inc. to try and litigate its case in a single proceeding with the eight other cases as the facts, arguments and defenses will be inexorably different. *Specially Appearing* Defendants in *James M. Kinder v. Harrah's Entertainment, Inc.* would be clearly prejudiced if its case was consolidated.

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C. High Risk of Confusion.

The risk of confusion and prejudice to *Specially Appearing* Defendants is high because there are different parties, different facts, and different causes of action. If *James M. Kinder v. Harrah's Entertainment, Inc.* were consolidated with the other cases, the trier of fact would have to hear and decide evidence related to the unique causes of action that KINDER has alleged against *Specially Appearing* Defendant – evidence and argument that would be completely immaterial to the other eight lawsuits. It is common sense that having to separate out such evidence, causes of action and unique elements from all of the other consolidated lawsuits, would likely result in confusion for the jury. (*See*, *Fleishman v. Prudential-Bache Securities,* 103 F.R.D. 623 (E.D. Wis. 1984) (strong likelihood of confusing the jurors if the cases were tried in a single proceeding).) Moreover, the essential facts giving rise to each and every case (the who, what, when and where of each alleged telephone call) are necessarily different from one another. Unlike the other Defendants litigating single TCPA violations, *Specially Appearing* Defendants will need to present facts and defenses separate and apart from those presented by the eight other defendants. There is unquestionably a strong likelihood of confusing the jurors if *Specially Appearing* Defendant Harrah's Entertainment, Inc.'s case were tried with the other cases in a single proceeding. (*See*, *Tucker v. Arthur Andersen & Co.*, 73 F.R.D. 316 (S.D. NY 1976) (where confusion and prejudice will result, it is inappropriate for the Court to order consolidation); *see also*, *American Photocopy Equipment Co. v. Fair, Inc.*, 35 F.R.D. 236 (N.D. Ill 1963) (same).)

V.

CONCLUSION

This Court should not require jurors to separate the facts of *Specially Appearing* Defendants' case from the eight other KINDER cases. Doing so would require the jury not only to juggle the facts in nine separate TCPA cases, but also navigate the issues of whether Harrah's Entertainment, Inc., Harrah's Operating Company, Inc., Harrah's Marketing Services Corporation, Harrah's License Company, LLC, Harrah's Laughlin, Inc., and HBR Realty Company, Inc. violated California Code § 1770, Business and Professions code § 17200 and whether the alleged phone calls constituted trespass to chattel. For all of the reasons stated above, *Specially Appearing* Defendants respectfully request this Court deny NATIONWIDE's motion to consolidate *James M. Kinder v. Harrah's Entertainment, Inc.*

SHEA STOKES ROBERTS & WAGNER, ALC

Dated: January 25, 2008

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